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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

NEXEON COMMUNICATIONS, INC.
et al.,

Plaintiffs and Appellants,

v.

A104966

**(San Francisco County
Super. Ct. No. 411260)**

**GLOBAL COMMUNICATIONS PARTNERS
II, L.P. et al.,**

Defendants and Respondents.

_____/

Nexeon Communications, Inc., acting on behalf of itself and various employees (collectively Nexeon) filed a complaint against Global Communications Partners II, L.P. and others (collectively GCP) alleging GCP had breached its contract and committed fraud when it failed to provide Nexeon with the funding Nexeon needed to complete a business transaction. GCP demurred to the complaint arguing Nexeon could not prevail on the causes of action it had alleged as a matter of law. The trial court agreed and sustained the demurrer without leave to amend. Nexeon now appeals. We will reverse.

I. FACTUAL AND PROCEDURAL BACKGROUND

Since this is an appeal from a judgment entered after the trial court sustained a demurrer, we set forth the facts as alleged in the complaint.

The Windemere is a residential housing development located in San Ramon. The developers of Windemere had sought unsuccessfully to find a company that could install a high-speed optical fiber network throughout the development. A lawyer for one of them contacted GCP to determine if it might be interested in creating a start-up company that could design and deploy the network. GCP decided to “incubate” a new company to exploit this opportunity.

In August 2001, representatives from GCP and Nexeon met. GCP told Nexeon that if Nexeon could negotiate an agreement with the Windemere to deploy the optical fiber network, GCP would provide Nexeon with the funding necessary to complete the project. Over the following months, GCP told Nexeon on seven different occasions that it would fund Nexeon if Nexeon could secure an agreement with the Windemere.

Based on those representations, Nexeon hired a team of communications specialists who designed and developed an optical fiber network for the Windemere development.

By January 2002, Nexeon was ready to commence serious negotiations with the Windemere developers. It was crucial to the negotiations that Nexeon could provide written evidence that it would have the funds necessary to complete the project. Therefore, two documents were executed on January 3, 2002. The first, described as a “commitment letter” is signed by Riaz Valani, the general partner of GCP. It states GCP “is pleased to set forth in this letter a commitment to make an investment . . . in Nexeon . . .” The letter states the investment would total \$8 million and would be made in exchange for Nexeon’s series A preferred stock. The letter also states that the investment would be made “[p]ursuant to the term sheet, dated January 3, 2002, enclosed herewith” and that “[a]dditional key terms and conditions of the Investment are set forth in the attached term sheet.”

The second document is the “term sheet” that is described in the first. Entitled “memorandum of terms for private placement of series A preferred stock of Nexeon Communications, Inc.” it sets forth the details of the proposed agreement between Nexeon and GCP. The first paragraph of the term sheet states as follows:

“The intent of this document is to describe, for negotiation purposes only, some key terms of the proposed agreement between Global Communications Partners II, L.P. (the ‘Investor’) and Nexeon Communications, Inc. (the ‘Company’). This document is not intended to be a binding agreement between the Investor and the Company with respect to the subject matter hereof A binding agreement will not occur unless and until all necessary Investor and Company approvals have been obtained and the parties have negotiated, approved, executed and delivered the appropriate definitive agreements. Until execution and delivery of such definitive agreements, both parties shall have the absolute right to terminate all negotiations for any reason without liability therefor.”

The term sheet is signed by Riaz Valani, the general partner of GCP and by Vishal Bhagwati, the president of Nexeon.

Armed with the commitment letter, Nexeon commenced serious negotiations with the Windemere developers. As those negotiations progressed, GCP continued to represent that GCP would fund Nexeon if Nexeon could secure an agreement with the Windemere.

On February 26, 2002, Nexeon secured an agreement with the Windemere developers to install the high-speed optical network. GCP however, refused to fund Nexeon because it lacked the money to do so.

In August 2002, Nexeon filed a complaint against GCP. As amended it sets forth nine causes of action. The first eight alleged various types of fraud. Nexeon alleged GCP had misrepresented its intent to provide funding for the Windemere project. The ninth cause of action alleged breach of a written contract. Nexeon alleged GCP had violated its promise to fund Nexeon as set forth in the January 3, 2002 commitment letter.

GCP demurred to the complaint. As to the breach of contract cause of action, it argued that when the commitment letter and term sheet were read together, it was clear GCP had not made a binding commitment to fund the Windemere project. With respect to the fraud causes of action, GCP argued that given the restrictions set forth in the “term sheet” Nexeon could not validly rely on any oral statements it may have made. The trial

court agreed with these arguments and sustained GCP's demurrer without leave to amend.

II. DISCUSSION

A. Standard of Review

When reviewing a judgment dismissing a complaint after the granting of a demurrer without leave to amend, courts must assume the truth of the complaint's properly pleaded factual allegations. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) We give the complaint a reasonable interpretation to determine whether the complaint alleges facts sufficient to state a cause of action. (*Ibid.*)

B. Breach of Contract

Although the breach of contract cause of action is pleaded last in the complaint, the parties have addressed it first and have devoted most of their briefing to that issue. We will follow a similar approach.

Nexeon alleged that GCP had breached its contract to invest in Nexeon if Nexeon could secure an agreement with the Windemere developers. The elements of a cause of action for breach of contract are: (1) a contract, (2) plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) resulting damages. (4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 476, p. 570.)

Here, Nexeon alleged the January 3, 2002 commitment letter constituted an offer by GCP for a unilateral contract that required no further manifestation of assent to conclude the funding commitment. Nexeon alleged it accepted by its performance, i.e., by securing an agreement with the Windemere developers, that GCP breached by failing to provide the promised funding, and that as a result, Nexeon suffered damages. We conclude the complaint was sufficient to state a cause of action for breach of contract.

GCP contends the complaint was inadequate. It notes the commitment letter expressly states that it is being made "pursuant to" the term sheet, and that the first paragraph of the term sheet makes clear there will be no agreement "until all necessary Investor and Company approvals have been obtained and the parties have negotiated, approved, executed and delivered the appropriate definitive agreements" Relying on

the rule that preliminary negotiations or an agreement to engage in future negotiations are not the functional equivalent of a valid subsisting agreement (see *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 59; *Beck v. American Health Group Internat., Inc.* (1989) 211 Cal.App.3d 1555, 1563), GCP contends that when the commitment letter and term sheet are read together, it is clear it did not have a contract with Nexeon.

We reject this argument for two reasons. First, “[w]here a complaint is based on a written contract which it sets out in full, a general demurrer to the complaint admits not only the contents of the instrument *but also any pleaded meaning to which the instrument is reasonably susceptible*. [Citation.]” (*Aragon-Haas v. Family Security Ins. Services, Inc.* (1991) 231 Cal.App.3d 232, 239 (*Aragon-Haas*), italics added.)

In this case, Nexeon alleged that the contract set forth in the commitment letter was related to but independent from the agreement set forth in the term sheet. According to Nexeon, the former set forth GCP’s agreement to invest in Nexeon if Nexeon could secure an agreement with Windemere. The latter set forth the manner in which GCP’s investment would be made. Since the commitment letter and term sheet are reasonably susceptible to the interpretation Nexeon has alleged, that interpretation must be accepted for purposes of the demurrer. (*Aragon-Haas, supra*, 231 Cal.App.3d at p. 239.) Under that interpretation, exclusions in the term sheet do not necessarily control provisions in the related but independent commitment letter.

Second, the thrust of the commitment letter is that GCP “commits” to funding Nexeon. The thrust of the term sheet by contrast, is that there is no commitment at all and that there will not be one unless and until “the parties have negotiated, approved, executed and delivered the appropriate definitive agreements.” If, as GCP argues, we read the commitment letter and term sheet together, the resulting agreement is ambiguous. When faced with an ambiguous contract, “[s]o long as the pleading does not place a clearly erroneous construction upon the provisions of the contract, in passing upon the sufficiency of the complaint, we must accept as correct plaintiff’s allegations as to the meaning of the agreement.”” (*Aragon-Haas, supra*, 231 Cal.App.3d at p. 239, quoting

Marina Tenants Assn. v. Deauville Marina Development (1986) 181 Cal.App.3d 122, 128.)

The interpretation Nexeon has advanced may ultimately prove to be invalid and Nexeon may fail to prove an enforceable contract; however, it is not clearly erroneous. At this state of the proceedings, it was improper to resolve the issue against it based solely on the allegations of its petition.¹

C. Fraud

The complaint includes eight causes of action alleging various types of fraud. All are based on the oral statements GCP made to Nexeon before and after the January 3, 2002 commitment letter. In essence, Nexeon alleges that GCP falsely represented that it would fund the Windemere project.

The parties have not addressed all eight causes of action individually in their briefs. Instead, they have focused on an issue common to all of them -- reliance. GCP contends that Nexeon could not justifiably rely on any oral statements it may have made, given the restrictions set forth in the January 3, 2002 term sheet.

However, as we have stated, the complaint alleges that GCP's promise to fund Nexeon if Nexeon could secure an agreement with the Windemere was separate and independent from the proposed stock purchase agreement that is set forth in the term sheet. For purposes of demurrer, we must accept that allegation as true. (*Aragon-Haas v. Family Security Ins. Services, Inc.*, *supra*, 231 Cal.App.3d at p. 239.) We cannot say, as a matter of law, that it was unreasonable for Nexeon to rely on GCP's repeated oral commitments in light of exclusions that are set forth in a related, but independent, term sheet. The court should not have sustained the demurrer under these circumstances. (Cf. *Hadland v. NN Investors Life Ins. Co.* (1994) 24 Cal.App.4th 1578, 1586.)

¹ GCP seems to contend that even if the trial court erred when it sustained the demurrer to the causes of action alleged, no claim could validly be alleged against its individual directors and officers. GCP has advanced this argument summarily in a footnote. We decline to address it on that basis. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1107, fn. 37, see also Cal. Rules of Court, rule 14(a)(1)(B).)

III. DISPOSITION

The judgment is reversed. Costs to appellant.

Jones, P.J.

We concur:

Simons, J.

Gemello, J.